ORIGINAL

No. 85-7087

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM THEODORE BOLIEK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

WILLIAM L. WEBSTER
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General
Counsel of Record

VICTORINE R. MAHON
Assistant Attorney General
Of Counsel

P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent

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STATEMENT OF THE CASE

Petitioner William Theodore Boliek, Jr., was convicted of one count of capital murder, in violation of § 565.001, RSMo 1978, and was sentenced to death for the killing of Jody Harless. The facts relating to her brutal murder are fully set forth in the opinion of the Supreme Court of Missouri affirming the petitioner's conviction and death sentence in State v. Boliek, 706 S.W.2d 847 (Mo. banc 1986), and will not be restated here. The facts relevant to the petitioner's two principal contentions, however, are as follows:

In August of 1983, the murder victim, Jody Harless became acquainted with her sister's boyfriend Ted Boliek, the defendant and petitioner in this cause. One Friday evening, Jody Harless, the defendant Ted Boliek, a man named Vernon Wait, and one other person committed a robbery at the home of an acquaintance. Jody Harless's participation in the robbery was that she drove the getaway car. Shortly thereafter, Ted Boliek and Vernon Wait began discussing the necessity of "getting rid" of witnesses to the robbery, including Jody Harless. A day or two after the robbery, Jody Harless sensed that the appellant might attempt to kill her. The victim told one Tommy Sutton that she was scared that she was going to be killed. She also told her boyfriend that she was afraid that the defendant was "gonna come and blow her head off".

On the Monday following the Friday robbery, the defendant convinced Jody Harless and her sister Jill to travel to Illinois with he and Vernon Wait. The defendant promised Jody's sister, that he would not hurt Jody.

En route to Illinois, the petitioner convinced the other passengers to drive to Thayer, Missouri, and hide-out with his parents. Later that evening, the group made a rest stop along a rural county road. It was at that time that the plaintiff pulled out a 12 gauge shotgun and shot Jody Harless once in the stomach and a second time in the face. Appellant's claim was that the initial shot was accidental and that the second shot was fired by

Vernon Wait. At trial, the prosecution introduced Jody Harless's statements of fear to rebut the theory of an accidental shooting.

With regards to his second contention involving the death qualification of the jury, it is sufficient to state that several jurors were struck because they expressed an inability to consider the full range of punishment which included the death penalty. Several of the veniremen who were struck on this basis specifically stated that their refusal to consider the death penalty was based on personal feelings and was not based on religious beliefs.

ARGUMENT

I.

Two days preceding her death, Jody Harless was scared she was going to be murdered. She had witnessed a robbery involving the defendant Ted Boliek and he also had learned that police were attempting to contact the witness Jody Harless. Ms. Harless expressed her fears to at least two individuals immediately preceding her murder. Her statement to Tommy Sutton was that she was afraid she was going to be killed. Harless also told her boyfriend that she was afraid the defendant was "gonna come and blow her head off". An eye-witness recounted that Jody Harless was later murdered by gunshot wounds to both the stomach and head. The defendant admitted that he shot Harless, but claimed that the shooting was accidental.

Petitioner now contends that the admission of the victim's hearsay statements constituted a violation of the confrontation clause, citing Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The statements introduced in the state court murder trial in the instant case, however, were admissible within the "state of mind" exception to the hearsay rule and was constitutionally permissible under the precepts enunciated in Ohio v. Roberts, supra. In that case, this United States Supreme Court ruled that the confrontation clause restricts the admission of hearsay unless two criteria are satisfied. First, the state must either produce or demonstrate the unavailability of the declarant and second, there must be some "indicia of reliability". 448 U.S. at 65, 100 S.Ct. at 2538-39.

In the case of sub judice, the first aspect is satisfied as the victim is deceased and obviously unavailable for testimony. The second aspect--reliability--"can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id. at 66, 100 S.Ct. at 2539. "In the present case the challenged testimony falls within the 'state of mind' exception to the hearsay rule, and thus reliability may be inferred." Lenza v. Wyrick, 665 F.2d 804, 811 (8th Cir. 1981).

Petitioner also hinges his contention on the nonconstitutional argument that the victim's statements were irrelevant to any issue at trial. Both federal and state courts, however, have developed three well-defined categories in which the decedent's statements are generally considered relevant in a prosecution for murder. These are circumstances in which the defendant relies upon the defenses of suicide, self-defense, or accidental death. See United States v. Brown, 490 F.2d 758, 767 (D.C. D.C. 1973); State v. Ford, 639 S.W.2d 573 (Mo. 1982); State v. Singh, 586 S.W.2d 410 (Mo.App., E.D. 1985); State v. Randolph, 698 S.W.2d 535 (Mo.App., E.D. 1985). The defendant's theory of the case was that his participation in the shooting was accidental. The victim's state of mind was relevant to rebut that defense.

Moreover, even if the evidence had been irrelevant, the evidence in this case, which included eye-witness testimony, was so overwhelming that no undue prejudice could have occurred by the admission of the victim's out of court statements. Therefore, any error in the admission of the testimony could only be construed as harmless error and the conviction was properly affirmed by the state supreme court.

II.

As the second prong of his attack on his conviction and death sentence, petitioner complains of the death qualification process employed during voir dire. While acknowledging that this Court's recent opinion in McCree v. Lockhart, ___ U.S. ___, 106 S.Ct. 1758 (1986), upheld the removal of "Witherspoon excludables", petitioner seeks to narrow the court's ruling in two modes.

First, petitioner claims that the Sixth Amendment fair cross-section requirements apply to the pool of prospective jurors which results after challenges-for-cause have been made, even though the petit jury, itself, does not have to mirror the composition of the community. Second, he claims that persons who are opposed to the death penalty for religious reasons are a "distinctive group" for fair cross-section purposes, as announced in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

With reference to the first of these proposals, the petitioner seeks to invoke the fair cross-section principle to invalidate certain challenges for cause, which this Court has specifically refused to do. "We have never invoked the fair cross-section principle to invalidate the use of either for cause or peremptory challenges to prospective jurors." (emphasis added). McCree v. Lockhart, 106 S.Ct. at 1764. There is simply is no support for the petitioner's proposition that the Sixth Amendment fair cross-section requirements apply to anything other than "'the point at which...names are put in the box from which the panels are drawn.'" 106 S.Ct. at 1765 (quoting from Pope v. United States, 372 F.2d 710, 25 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968).

Even if this court was to hold that the fair cross-section requirements apply to that refined pool of jurors which results from the strikes-for-cause, petitioner also fails in presenting any legitimate argument that persons who merely share a particular bias about capital punishment, constitute a "distinctive group".

Petitioner argues that persons, whose views on capital punishment are religiously based, are improperly excluded from the venire panel because their removal deprives the defendant of input from the traditionally religious bodies such as Quakers and Church of Brethren. In the instant case, there is no evidence that the venireman struck for cause were members of any organized or otherwise identifiable religious organizations such as the Quakers. Thus, it cannot be argued that their exclusion was an exercise of invidious religious discrimination. Moreover, the death qualification of the venirepanel is designed to remove only those persons who choose not to temporarily set aside their beliefs in deference to the law. "It is important to remember that not all persons who oppose the death penalty are subject to removal for cause in capital cases,....". Id. Thus, the death qualification procedure does not remove all Quakers or all members as any other religious affiliation.

Unlike persons who may be excluded because of ancestry, race or sex, the "Witherspoon exludables" are excused from the venire panel for reasons directly related to their ability to serve as jurors; i.e.; their inability to consider the full range of punishment and the inability to follow the law and instructions of the Court.

CONCLUSION

In view of the foregoing, the respondent submits that the petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General
Counsel of Record

VICTORINE R. MAHON
Assistant Attorney General
Of Counsel

P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent